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courts are unable, or unwilling, to meet the demands of the situation, this would seem a fit field for legislative action. Such legislation would have the advantage of being able to work out detailed rules having regard to the size and nature of a business with reference to the trustworthiness of its records. In any event a large amount of discretion should be left to the trial court.

**THE LIABILITY OF THE MANUFACTURER OF A DEFECTIVE AUTOMOBILE TO A SUB-VENDEE.** — The much discussed question of the liability of a manufacturer of an article which, because of his negligence, is defective, to a remote vendee who is injured as a result of the defect, has been passed on by the New York Court of Appeals in a way which will undoubtedly settle the question in that state. In a recent case, the manufacturer of an automobile was held liable to a sub-vendee for an injury resulting from a defective wheel which negligent inspection had allowed to become a part of the machine. *McPherson v. Buick-Motor Co.*, 54 N. Y. L. J. 2339.

It is well settled that the manufacturer of an article impliedly warrants its merchantability and general fitness for use.<sup>1</sup> This is a comparatively modern rule, but is merely an extension of the stringent liability early imposed on the seller of food.<sup>2</sup> The rule is now extended to all articles, and an automobile is clearly not an exception.<sup>3</sup> But since a warranty does not run with the goods,<sup>4</sup> it can only be taken advantage of by the immediate vendee.<sup>5</sup>

<sup>1</sup> *Jones v. Bright*, 5 Bing. 533; *Randall v. Newson*, 2 Q. B. D. 102; *The Nimrod*, 141 Fed. 215. In England, the same warranty is implied on a sale by a dealer. *Frost v. Aylesbury Dairy Co.*, [1905] 1 K. B. 608; *Preist v. Last*, [1903] 2 K. B. 148. The weight of American authority, however, holds that a dealer who is not a manufacturer makes no such warranty in the sale of specific goods. *White v. Oakes*, 88 Me. 367, 34 Atl. 175; *Gage v. Carpenter*, 107 Fed. 886.

<sup>2</sup> The rule that a dealer in food warrants its wholesomeness was probably originally statutory. See *Burnby v. Bollett*, 16 M. & W. 644. It is now generally accepted at common law. *Wallis v. Russell*, [1902] 2 I. R. 585; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210. A few courts, however, have recently denied the rule in cases where the dealer has no part in the preparation of the goods and no chance to find out defects, basing their decision on its alleged unsuitability to modern conditions. *Bigelow v. Maine Cent. R. Co.*, 110 Me. 105, 85 Atl. 396. *Valeri v. Pullman Co.*, 218 Fed. 519. This is certainly strong ground for holding the liability of the person first in fault to extend to sub-vendees. It is notable that the New York Appellate Division, while feeling bound by authority to hold a dealer in food to a liability as warrantor, has, in a recent case, declared its reluctance to do so. *Rinaldi v. Mohican Co.*, 54 N. Y. L. J. 2188.

<sup>3</sup> See *Buick Motor Co. v. Reid Mfg. Co.*, 150 Mich. 118, 113 N. W. 591.

<sup>4</sup> *Prater v. Campbell*, 110 Ky. 23, 60 S. W. 918; *Smith v. Williams*, 117 Ga. 782, 45 S. E. 394; *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288. See WILLISTON, SALES, § 224. There are, however, *dicta* to the contrary in *Childs v. O'Donnell*, 84 Mich. 533, 538, 47 N. W. 1108, 1109, in *Mazzetti v. Armour & Co.*, 75 Wash. 622, 624, 135 Pac. 633, 634, and in *Catani v. Swift & Co.*, 95 Atl. 931, 932 (Pa.).

<sup>5</sup> It is of course true that a middleman who has been obliged to pay damages to his vendee may recover them back from his vendor. *Reggio v. Braggiotti*, 7 Cush. (Mass.) 166; *Reese v. Miles*, 99 Tenn. 398, 41 S. W. 1065. It has even been held that a middleman who is liable for breach of warranty, but who has not yet paid, may recover his prospective damages from his vendor. *Buckbee v. Hohenadel Co.*, 224 Fed. 14. See 29 HARV. L. REV. 221. It must follow that the sub-vendee can proceed against the

On the other hand, it would seem clear on principle that when the manufacturer is negligent (but only then), he should be liable to anyone within the zone of danger from his negligence and injured as a proximate result of it. However, the courts have generally denied the existence of such liability to anyone with whom the manufacturer did not directly contract.<sup>6</sup> This is put on the ground that there is no duty to anyone but the immediate vendee. But apart from any contract relations, a manufacturer certainly ought to owe a duty to anyone who is likely to be injured by his negligence in making the article; and who can be more likely to suffer injury than the sub-vendee who is to use it? The denial of his right, therefore, can probably be best explained by reference to theories of legal causation that are now considered antiquated.<sup>7</sup> Of course the manufacturer cannot be held liable unless his act is wrongful; he is justified in selling a defective article if he gives proper warning to his immediate vendee, and he could not then be held liable for an injury to a sub-vendee. But when no warning has been given, as must always be the case when the negligence has been unwitting, there has been a wrongful act to found the liability. The liability should then extend to any injured person whose contact with the goods could have been foreseen at the time the defendant made the sale.<sup>8</sup> The other rule, combined with the American doctrine that in a sale of specific goods a dealer makes no implied warranty against latent defects, brings about the result that often the injured sub-vendee can get no redress at all. He cannot sue the manufacturer, and he cannot sue the dealer because the latter is not negligent. Such a result is most unfortunate.

The realization of courts that this was so, resulted in two far-reaching exceptions to the rule. One is where the manufacturer fraudulently conceals known defects.<sup>9</sup> The other is where the article is "intrinsically middleman and attach this claim which the latter has against the first vendor. He can very likely reach it ahead of other creditors of his vendor, for it is a claim to exoneration from liability to him, and if he collects only a dividend on this liability while the estate is paid as if he had been paid in full, the other creditors are enriched at his expense. Cf. *In re Richardson*, [1911] 2 K. B. 705. But none of these results can be attained unless the middleman is liable. This is a possible argument for holding dealers strictly to an implied warranty.

<sup>6</sup> The traditional leading case for this proposition is *Winterbottom v. Wright*, 10 M. & W. 109. The case does not really stand for the proposition, as it went off on a question of pleading, and was, as such, correctly decided. However, the proposition of the text is squarely supported by numerous cases, most of them professing to follow *Winterbottom v. Wright*, *supra*. *Collis v. Selden*, L. R. 3 C. P. 495; *Loop v. Litchfield*, 42 N. Y. 351; *McCaffrey v. Mossberg & Granville Mfg. Co.*, 23 R. I. 381, 50 Atl. 651; *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 19 S. W. 630. The matter has not been squarely decided in the United States Supreme Court, but a *dictum* in *Savings Bank v. Ward*, 100 U. S. 195, 202, appears to support this proposition.

<sup>7</sup> "That the act of the purchaser who uses the article, though known to be defective, for the very purpose for which it was sold, for which the vendor knows it is to be used, should be regarded as legally unnatural and unexpected, is a relic of the distinction between legal and actual probability once common to all subjects." F. H. Bohlen, "Affirmative Obligations in the Law of Torts," 44 AM. L. REG. (N. S.) 209, 341.

<sup>8</sup> The limitation of liability to persons who are foreseeably likely to have dealings with the goods is evidently the ordinary limitation of tort liability for negligence. It takes care quite adequately of the case that is the chief terror of the courts that cling to the old rule, the case, that is, where the defendant's product has been taken and made up into a complicated article which has finally done damage to the plaintiff.

<sup>9</sup> *Huset v. Case Threshing Machine Co.*, 120 Fed. 865; *Woodward v. Miller*, 119 Ga. 618, 46 S. E. 847; *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098.

dangerous.”<sup>10</sup> In either of these exceptions it is hard to find any duty to the injured sub-vendee if it does not exist in the ordinary case. The latter exception is very elastic. Its development has been especially interesting in New York. The first case recognizing the exception<sup>11</sup> applied it to a poisonous drug improperly labeled. But a little later the principle was held not to apply to a flywheel<sup>12</sup> nor to a boiler.<sup>13</sup> In later years, however, the New York courts have carried this exception to its extreme and the following articles have been held intrinsically dangerous: a scaffold,<sup>14</sup> a derrick rope,<sup>15</sup> an elevator,<sup>16</sup> a siphon bottle,<sup>17</sup> and a steam coffee urn.<sup>18</sup> Indeed, two other courts have informed us that a cake of soap is such an intrinsically dangerous article.<sup>19</sup> When we see a so-called exception carried to such extremes, it clearly shows that the rule itself is recognized as wrong and is as good as abrogated.<sup>20</sup>

Fortunately, however, the court in the principal case does not attempt to justify its result (as indeed it might without serious inconsistency have done) on a further application of the exception of intrinsically dangerous articles. The decision is avowedly based on ordinary principles of tort liability.<sup>21</sup> The result reached must be deemed alike sound in principle and desirable in policy.

#### RELIEF FOR WRONGFUL EXPULSION FROM ENGLISH TRADE UNIONS. —

The rights of members of a trade union *inter se* have been rather unsettled in England since the trade union acts of 1871.<sup>1</sup> That act legalized such associations, but provided that it should not enable any legal proceedings to be maintained for “directly enforcing or recovering damages for the

<sup>10</sup> *George v. Skivington*, L. R. 5 Exch. 1; *Thomas v. Winchester*, 6 N. Y. 397; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118; *Roberts v. Anheuser-Busch Brewing Co.*, 211 Mass. 449, 98 N. E. 95. The rule, as might be expected, is applied frequently in cases relating to defective food. *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314; *Ketterer v. Armour & Co.*, 200 Fed. 322; *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633; *Catani v. Swift & Co.*, 95 Atl. 931 (Pa.).

<sup>11</sup> *Thomas v. Winchester*, 6 N. Y. 397.

<sup>12</sup> *Loop v. Litchfield*, 42 N. Y. 351.

<sup>13</sup> *Losee v. Clute*, 51 N. Y. 494.

<sup>14</sup> *Delvin v. Smith*, 89 N. Y. 470. Cf. *Coughtry v. Globe Manufacturing Co.*, 56 N. Y. 124.

<sup>15</sup> See *Davies v. Pelham Hod Elevator Co.*, 65 Hun 573, 20 N. Y. Supp. 523.

<sup>16</sup> *Kahner v. Otis Elevator Co.*, 96 N. Y. App. Div. 169, 89 N. Y. Supp. 185.

<sup>17</sup> *Torgeson v. Schultz*, 192 N. Y. 156, 84 N. E. 956.

<sup>18</sup> See *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 481, 88 N. E. 1063, 1064.

<sup>19</sup> *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157; *Armstrong Packing Co. v. Clem*, 151 S. W. 576 (Texas).

<sup>20</sup> See 17 HARV. L. REV. 274. Cases that show this even more clearly than those cited are *Mazzetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, and *Quackenbush v. Ford Motor Co.*, 167 N. Y. App. Div. 433, 153 N. Y. Supp. 131, in both of which recovery was granted for an injury other than a hurt to the plaintiff's body. Such cases cannot by any stretch be brought within the reasons given for the “intrinsically dangerous” exception.

<sup>21</sup> “We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.”

<sup>1</sup> 34 & 35 VICT. c. 31.